United States Department of Labor
Employees' Compensation Appeals Board

L.K., Appellant	)	
and	)	**Docket No. 08-849**
	)	**Issued: June 23, 2009**
DEPARTMENT OF TRANPORTATION FEDERAL AVIATION ADMINISTRATION, Phoenix, AZ, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 28, 2008 appellant filed a timely appeal from the February 20 and December 13, 2007 decisions of the Office of Workers' Compensation Programs, which denied his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On August 14, 2006 appellant, a 28-year-old air traffic controller, filed a traumatic injury claim alleging that he sustained an emotional condition on August 10, 2006 when Harold Sharp,

manager of air traffic control, made a death threat against him.[1] At the time of the threat, he was taking his final break of the day with three other coworkers. Appellant stopped work that day and did not return.[2] The employing establishment controverted the claim.

On August 15, 2006 Gary Mulzyn, a coworker, noted that he was working his regular shift when he observed Mr. Sharp become visibly angry and engage appellant in a heated exchange of words. As part of the exchange, appellant responded to Mr. Sharp by stating that he just made a death threat: "Prior to [appellant's] response, I heard [Mr. Sharp] state that [appellant] was going to see somebody real soon."

On August 31, 2006 Robin Smuda, appellant's supervisor, stated that appellant was located off premises in a break room at Cutter Aviation where he was unable to be recalled. Appellant had not been granted permission to be off premises and was directed by Mr. Sharp, who had gone to Cutter Aviation, to return to the control tower until the end of his shift. The supervisor alleged that appellant became antagonistic and verbally challenged Mr. Sharp, telling him that a call to the employing establishment hotline would be made. After Mr. Sharp responded, appellant told the manager that he would call the police as he perceived that Mr. Sharp made a death threat. Mr. Smuda noted that this encounter took place while appellant was off premises and being insubordinate. Approximately 25 minutes after he finished his shift, appellant came back into the tower and confronted Mr. Sharp in an aggressive manner and demanded that he go talk to a police officer who appellant had summoned to arrest him. When Mr. Sharp refused, appellant indicated that he would escort the police officer to the tower. He became more agitated and belligerent when Mr. Sharp told him he did not have to talk to the police officer. Mr. Smuda noted that this created a commotion which distracted the three controllers on duty.

On November 2, 2006 appellant, through counsel, noted that Mr. Smuda was the operations supervisor for 14 control specialists and that his superior was Mr. Sharp, the air traffic manager. He described an April 21, 2006 incident as "background only," noting that no medical care was sought.[3] At 1:10 p.m. on August 10, 2006 appellant took his final break in another building with three other employees. He contended that this practice was acceptable and customary and that the television at the employing establishment facility was broken. Mr. Sharp came to the Cutter Aviation lounge, demanding that the employees get back to work. Allegedly, he repeatedly referred to appellant as "little boy" and continued "harping on it even though [appellant] was on his way back to the tower." Appellant said, "Jesus Christ!" at which point

[1] Appellant subsequently requested that the Office adjudicate his claim as an occupational disease as he attributed his emotional condition to work factors occurring over more than one work shift. He referred to a prior claim, File No. xxxxxx821, in which the Office accepted that he sustained an aggravation of a low back strain after being struck in the back by his supervisor on September 2, 2005.

[2] The record reflects that on October 2, 2007 appellant was removed from his position due to unavailability for duty.

[3] Appellant alleged that on April 21, 2006 he took over for Mr. Smuda who had been temporarily working while another employee was on break. He noted two airplanes that were on a collision course and notified the pilot of the smaller plane before warning the other pilot. The pilot of the larger plane demanded, by radio, to make a complaint to his supervisor about the incident. Appellant alleged that Mr. Smuda heard the complaint and began yelling and punching his fist into his other hand while looking at him.

Mr. Sharp said: "You like Jesus? You will be seeing Jesus soon." Appellant interpreted this as a death threat and contacted the police.

On November 13, 2006 Warren J. Meehan, district manager, stated that appellant was with other employees at an unauthorized location during a break. Appellant became belligerent when questioned by management and all the employees were told to return to work. Mr. Meehan advised that Mr. Sharp was interviewed by the employing establishment security and, in response to appellant's threat to call the hotline, had stated, "I don't care if you call Jesus or your mother. Get back to the facility now." He reiterated that appellant was away from his official duty station without permission or the ability to be recalled.

In a February 20, 2007 decision, the Office denied appellant's claim. It found that appellant was confronted by Mr. Sharp at an off-site location and directed to return to work. The Office found that the collective bargaining agreement did not support appellant's contention that controllers were entitled to a break every 90 minutes; rather, controllers were not required to spend more than two hours performing operation duties without a break. However, the break was to be in a nonoperational area. Therefore, appellant was not entitled to watch TV in a building maintained by a private company. Further, the Office found that appellant did not establish that Mr. Sharp made a death threat against him on August 10, 2006. It was determined that there was no evidence of error or abuse by the employer in carrying out any administrative actions.

By letter dated July 11, 2007, appellant, through his attorney, requested reconsideration. He submitted an affidavit filed in connection with an Equal Employment Opportunity (EEO) complaint against the employing establishment. Appellant addressed the April 21, 2006 near miss incident in the tower, contending that Mr. Smuda became violent against him, which constituted discrimination. He noted that he informed an EEO office that Mr. Smuda was discriminating against him based on age as he was the youngest employee; however, the counselor encouraged him to simply claim reprisal for protected activities. Appellant stated that he reported this incident to Mr. Sharp, but that no disciplinary action was taken. He alleged that, at a May 5, 2006 meeting, Mr. Sharp stated that he was upset at appellant for filing an EEO complaint and "implied that I must drop the complaint or face retaliatory consequences." Appellant addressed his work schedule and that of Mr. Smuda. As to the incident on August 10, 2008, he contended that Mr. Sharp "improperly ordered everyone to go back to the tower." Appellant alleged that Mr. Sharp began a stream of abusive comments and called him a "little boy." On the way back to the tower, as the manager continued to berate him in front of the other employees, appellant said, "Jesus Christ!" and the manager responded, "You like Jesus? You'll be seeing Jesus very soon." Appellant reiterated that he interpreted this comment as a death threat and contacted the police.

In affidavits dated November 6 and December 5, 2006, Mr. Sharp noted that appellant never made any requests not to work with Mr. Smuda and had the opportunity to bid his set days off under the bargaining agreement. He noted that there were 17 controllers and that Mr. Smuda was presently the only supervisor.[4] Therefore, it was inevitable that appellant would work with

[4] Mr. Sharp and Mr. Smuda noted that another supervisor had become incapacitated due to a medical condition.

Mr. Smuda under the standard rotation. Mr. Sharp advised that he conducted an investigation into the April 21, 2006 incident and that no one corroborated appellant's allegations concerning Mr. Smuda's behavior. However, on June 12, 2006, he changed appellant's days off to alleviate the possibility of further confrontations or continued disruptions to operations at the facility. Appellant did not come to him concerning any complaints. At the May 5, 2006 meeting, Mr. Sharp advised appellant as to the chain of command and grievance process. He denied ever berating appellant.

Mr. Sharp disputed appellant's version of the August 10, 2006 incident. Mr. Smuda had assigned appellant controller in charge (CIC) duties and responsibilities, leaving a minimum of three operational positions appropriately staffed. Mr. Sharp and Mr. Smuda were overseeing employee training that day. Appellant was notified that two of the four afternoon controllers that were due in at 1:00 p.m. were assigned to undergo training at 1:05 p.m. In spite of this, he authorized four employees, including himself, to take a 40-minute break, leaving only two operational positions staffed. Mr. Sharp stated that this violated facility policy as it presented a potential derogation to safety. When he was made aware of this, he stopped training to investigate and discovered that the four controllers were not in the authorized break room and management had not been notified of their whereabouts. During this time, with only two operational positions open, a potentially disastrous situation gave rise to an immediate call back. Since the whereabouts of the four controllers were unknown, Mr. Smuda went to assist the controllers in the tower. Mr. Sharp noted that leaving the facility during breaks was not prohibited if proper approval was obtained from management. However, as CIC, appellant failed to brief the relieving CIC of the whereabouts of those he authorized to be on break and, after relinquishing such duties, failed to obtain approval to leave the facility. Mr. Sharp concluded that the entire situation would not have occurred had appellant followed agency policies and protocol.

Mr. Sharp subsequently located appellant and the other coworkers off the premises in the break room of a privately owned company next door. An employee on break was subject to immediate recall, which meant that he must be at the facility in order to hear the intercom system to be reached immediately. Mr. Sharp advised that it was his responsibility to ensure proper staffing and personnel accountability and that appellant had not obtained permission to be off premises. He noted that appellant immediately started challenging his authority and told him to chill out. Mr. Sharp responded that appellant should stop acting like a little boy. Appellant then threatened to make a call to the employing establishment hotline. Mr. Sharp stated that he did not care who appellant called and that he needed to be at the facility until the end of his shift. Appellant then threatened to call the police.

On November 14, 2006 Mr. Smuda denied shaking his fist at appellant or yelling during the April 21, 2006 incident. He acknowledged that he may have spoken loudly to overcome noise from the runway and overhead air conditioning unit.[5]

[5] Mr. Smuda addressed the September 2005 incident, noting that he touched appellant's lower back to get his attention after two or three attempts.

Appellant also submitted statements from John Novak, Earl T. Slocum and Gary M. Murzyn, his coworkers.[6] Of note, Mr. Murzyn stated:

> "On August 10, 2006 at 12:30 p.m. I was assigned security training in the Air Traffic office with the supervisor, Mr. Smuda, which ended at approximately 12:55 p.m. Mr. Smuda then showed me photos of the new control tower and I left the office at approximately 1:05 p.m. I then walked to Cutter Aviation and phoned the tower while using the pilot's lounge. [Appellant] answered the tower phone as he was the Controller-In-Charge. I told [him] that my training in the Air Traffic office was complete and asked if he needed me in the tower. [Appellant] stated that he did not need me and I told [him] that I would be at Cutter Aviation if he needed me. I began work at 5:45 a.m. that morning and it was standard and common practice … to take a break from approximately 1:00 p.m. until the end of our shift, which was 1:45 p.m."

On October 30, 2007 Mr. Smuda noted that he had reviewed the statements of appellant and the other employees. He reiterated that breaks were not authorized outside of the employing establishment facility without prior approval as air traffic control specialists were subject to immediate recall. Mr. Smuda advised that neither Mr. Sharp nor he had authorized appellant to be off the premises at the Cutter Aviation facility. He also noted that the managers were not aware that appellant and the other controllers were not in the facility until after having made a general page to recall controllers. Mr. Smuda stated that it "was well known that breaks outside of the facility were not authorized without management approval." He submitted a copy of the employing establishment rules regarding watch supervision and breaks.[7]

By decision dated December 13, 2007, the Office denied modification of the February 20, 2007 decision.

LEGAL PRECEDENT

Congress, in providing a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability, does not attach merely upon the existence of an employee employer relationship. Instead, Congress provided for the payment of compensation for personal injuries sustained while in the performance of duty.[8] The phrase "while in the performance of duty" has been interpreted by the

[6] Each employee contended that taking a break at the Cutter Aviation facility break room was authorized and denied being informed that leaving the premises during breaks was prohibited. Mr. Novak and Mr. Slocum did not overhear what Mr. Sharp stated to appellant. Mr. Murzyn noted that in response to appellant stating, "Jesus, give me a break," Mr. Sharp stated that appellant would "be seeing Jesus real soon."

[7] Mr. Smuda submitted employing establishment materials pertaining to watch supervision assignments. Personnel performing such duties are responsible for knowing the whereabouts of employees to ensure their availability. If a supervisor or CIC leaves the operational area or engaged in an activity which would preclude such duties, another qualified person must be designated to the watch.

[8] *See* 5 U.S.C. § 8102(a). *See also Howard M. Faverman*, 57 ECAB 151, 154 (2005); *Kathryne Lyons*, 49 ECAB 295 (1998).

Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[9] In addressing this issue, the Board has stated:

> "In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[10]

In determining whether an injury occurs in a place where the employee may reasonably be or constitutes a deviation from the course of employment, the Board will focus on the nature of the activity in which the employee was engaged and whether it is reasonably incidental to the employee's work assignment or represented such a departure from the work assignment that the employee becomes engaged in personal activities unrelated to his or her employment.[11]

ANALYSIS

On August 10, 2006 appellant was assigned to CIC watch duties by his supervisor, Mr. Smuda. At approximately 1:10 p.m. he was contacted by Mr. Mulzyn, who was on a break at Cutter Aviation. Appellant advised Mr. Mulzyn that his services in the tower were not required. At some point thereafter, he departed his assignment as CIC, leaving two controllers in the tower. Appellant joined several coworkers off premises at the Cutter Aviation lounge to watch television.

The Board finds that, by going off premises to the Cutter Aviation facility, appellant deviated from his employment. The evidence reflects that appellant received the CIC assignment from his supervisor and was left with two other controllers in the tower. Mr. Smuda and Mr. Sharp noted that they were engaged in overseeing the training of controllers who were ending their shift and those who were to soon commence work. This was confirmed by Mr. Murzyn, who stated that he was in training with Mr. Smuda until 12:55 p.m., before he left the premises to go to Cutter Aviation to watch television. The record establishes that appellant had fixed hours and place for work on the premises of the employing establishment facility. When Mr. Sharp learned of his absence from the tower, he directed Mr. Smuda to assist the two controllers on duty and made a general page to recall the controllers due to a possible fly over situation. However, they were not at the employing establishment facility break room. Mr. Sharp subsequently went to the Cutter Aviation facility and directed appellant to return to his duties at the tower until the end of his work shift.

The argument between Mr. Sharp and appellant took place off premises after appellant had deviated from duty. His presence at Cutter Aviation was not expected or authorized by

[9] *See Robert T. Romans*, 53 ECAB 620, 621-22 (2002); *Robert W. Walulis*, 51 ECAB 122, 123 (1999).

[10] *See Vincent A. Rosenquist*, 54 ECAB 166, 168 (2002); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[11] *See Bradford N. Reed*, 56 ECAB 428 (2005).

management nor was he engaged in any activities reasonably incidental to his employment as a controller. Appellant was not in the performance of duty. He contends that his break was compensable under the personal comfort doctrine. Larson addresses a close relationship between the deviation doctrine and personal comfort doctrine in those cases where the smallness of the deviation is immaterial.[12] He notes that there are "insubstantial" deviations of momentary diversion that, if undertaken by an inside employee working under fixed time and place limitation, would be compensable under the personal comfort doctrine.[13] At the time of the argument with Mr. Sharp, appellant was located off premises, away from his duties as an air traffic controller subject to recall and not engaged in any activity that can be considered as reasonably incidental to his employment. Moreover, the employer provided an employee break room on the premises in order that the controllers would be close by in case of any emergency. The Board finds that his visit to the Cutter Aviation facility cannot be characterized as coming within the personal comfort doctrine.[14] While appellant may have been entitled to a break from his duties, he did not obtain prior approval from management to leave the employing establishment facility. His deviation from the premises is not "immaterial."

In *Roma A. Mortenson-Kindschi*,[15] the employee sustained injury off premises where she fell on ice in a parking lot next to her office while taking a smoke break. The injury was found compensable as generally related to personal comfort. She was on an authorized but unscheduled break that a supervisor noted was traditionally allowed and for which there was no express prohibition.[16] In the present case, the evidence of record establishes that the policy of the employing establishment was to allow employees to take breaks from work on the premises in the break room or, if prior approval was obtained, off premises. Appellant's supervisor advised that breaks were not authorized outside of the employing establishment facility without prior approval as the controllers were subject to immediate recall. Mr. Sharp and Mr. Smuda stated that appellant had not been authorized to take a break off premises. The distinguishing factor in this case is that appellant's off-premises activities were neither accepted nor approved

[12] *See David P. Sawchuk*, 57 ECAB 316 (2006); *Janet M. Abner*, 53 ECAB 275 (2002), citing A. Larson, *The Law of Workers' Compensation*, Vol. 1, § 19.63.

[13] Actions likened to incidental acts, such as using a toilet, drinking coffee or similar beverage or eating a snack during a recognized break in the daily work hours, are generally recognized as personal ministrations that do not take the employee out of the course of employment. *See Barbara D. Heavener*, 53 ECAB 142, 146 (2001).

[14] Even if appellant was on the premises at the time of his argument with Mr. Sharp, the Board notes that the evidence of record does not establish that a death threat was made. *Compare, Gregory N. Waite*, 46 ECAB 662 (1995) and *Richard L. Harris*, 02-152 (issued May 2, 2002) with *Elbert V. Brooks*, Docket No. 03-1512 (issued August 14, 2003) and Docket No. 00-772 (issued January 2, 2002). Although the Board has recognized the compensability of verbal altercations, this does not imply that every statement uttered in the workplace will give rise to compensability. *See John M. Hagewood*, 56 ECAB 479 (2005); *Cyndia R. Harrell*, 55 ECAB 522 (2004).

[15] 57 ECAB 418 (2006).

[16] *Compare Helen L. Gunderson*, 7 ECAB 288 (1954), *reaff'd on recon.*, 7 ECAB 707 (1955) (the employee was injured off premises while on her way to get coffee on her morning break; the Board found a compensable injury, noting that coffee was not available on the premises and that the employer had knowledge and consented to the practice) and *Harris Cohen*, 8 ECAB 457 (1955) (the employee sustained injury while returning to the premises from getting coffee; the Board held the injury was not sustained in the performance of duty as the employer had an established rule that did not allow employees to leave the premises during rest, coffee or relief breaks).

by his employer and were not in accordance with any generally accepted past practice.[17] Appellant's injury does not come within the personal comfort doctrine.

Appellant also attributed his emotional condition to an incident on April 21, 2006, when following a near-miss incident, Mr. Smuda became violent against him. He also contended that his supervisor had discriminated against him. Appellant stated that his supervisor heard a complaint from a pilot and began yelling and punching his fist into his hand while looking at him. He has not submitted sufficient evidence to establish that the actions of Mr. Smuda were either violent in nature or a form of discrimination directed against him. On November 2, 2006 appellant described this incident as "background only," indicating that no medical care was sought. Mr. Smuda denied ever shaking his fist or yelling at appellant on that day. Appellant stated that he brought this to the attention of Mr. Sharp, but no action was taken. However, Mr. Sharp stated that he investigated the incident and that no one confirmed appellant's allegations.[18] The evidence of record is not sufficient to establish this as a compensable employment factor.

On May 5, 2006 appellant met with Mr. Sharp. He alleged that the air traffic manager was upset, berated him and stated that appellant would be retaliated against if he did not drop the EEO complaint. Mr. Sharp noted meeting with appellant and advising him as to the grievance process and to follow the chain of command. He denied berating appellant or threatening retaliation. Again, the evidence of record does not substantiate appellant's contentions so as to establish a compensable employment factor.[19]

CONCLUSION

The Board finds that appellant did not sustain an emotional condition in the performance of duty.[20]

[17] In contrast, Mr. Murzyn noted that he called appellant as the CIC to inquire as to whether he was needed in the tower and, when advised that his services were not required, stated that he would be located at Cutter Aviation.

[18] The statements from appellant's coworkers did not address this allegation.

[19] To the extent appellant contends that his emotional condition is related to the September 2, 2005 incident, he may pursue this under that claim number.

[20] As appellant has not established any compensable employment factors, the Board will not address the medical evidence. *See Lori A. Facey*, 55 ECAB 217 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board